



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

**MAY 29 2009**

Craig Engle, Esq.  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036-5339

**RE: MUR 6023**  
**The Loeffler Group, LLP**

Dear Mr. Engle:

On June 16, 2008, the Federal Election Commission ("the Commission") notified your client, The Loeffler Group, LLP, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 19, 2009, the Commission found, on the basis of the information in the complaint and information provided by your client, that there is no reason to believe The Loeffler Group, LLP violated 2 U.S.C. § 441a. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Ana Pefia-Wallace, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

**Peter G. Blumberg**  
**Assistant General Counsel**

**Enclosure**  
**Factual and Legal Analysis**

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT:** The Loeffler Group, LLP  
5 Susan Nelson

**MUR: 6023**

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8 **I. INTRODUCTION**

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10 This matter is based upon a complaint filed with the Federal Election Commission ("the  
11 Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that The Loeffler Group,  
12 LLP ("LG") made an excessive in-kind contribution to John McCain 2008, Inc. and Joseph  
13 Schmuckler, in his official capacity as treasurer ("McCain Committee").<sup>1</sup> The complaint alleges  
14 that LG made payments to Susan Nelson, a former lobbyist who left LG to become the McCain  
15 Committee's Finance Director, which amounted to undisclosed excessive in-kind contributions  
16 to the McCain campaign.

17 Based upon the available information, including a written response from LG  
18 denying the allegations, there is no information to indicate that the Respondents may have  
19 committed the violation alleged in the complaint. Accordingly, the Commission finds no reason  
20 to believe that The Loeffler Group and Susan Nelson violated the Federal Election Campaign  
21 Act of 1971, as amended ("the Act"), in connection with the allegations in this matter.

22 **II. FACTUAL AND LEGAL ANALYSIS**

23 **A. Factual Background**

24 Susan Nelson worked as a lobbyist for LG from August 2005 through July 2007, when  
25 she left to work full time as the Finance Director for the McCain campaign. LG Response to

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<sup>1</sup> The complaint was based on information from a press report discussing lobbyist ties to the McCain campaign. Complaint at 1; Michael Isikoff, *McCain vs. Lobbyists*, NEWSWEEK, May 26, 2008, at 6.

1 Complaint ("LG Response") at 1 and 3 and Aff. at ¶ 6; Tory Newmyer & Kate Ackley, *K Street*  
2 *Files*, ROLL CALL, July 13, 2005. After she left LG, she continued to receive monthly payments  
3 from the firm in the amount of \$15,000 until April 2008. Isikoff, *supra* note 1, at 6. The  
4 complaint claims that the payments for alleged part-time consulting services "dwarfed [Nelson's]  
5 approximately \$6,300 monthly salary" for full-time work with the McCain committee.  
6 Complaint at 3. As such, the complaint questions whether LG actually made excessive in-kind  
7 contributions to the McCain campaign by paying such a large salary to Nelson for part-time  
8 work and whether Nelson, in fact, did any work for LG during this period.

9 LG responds that from August through December 2007, LG's payments to Susan Nelson  
10 consisted of severance payments that were part of a severance agreement entered into with  
11 Nelson when she left the firm. LG Response at 5. LG explains that these payments were  
12 commercially reasonable, as well as consistent with and pursuant to LG's pre-existing severance  
13 policy and practices. *Id.* at 5, 11-12, and Aff. at ¶ 6. According to LG, the severance payments  
14 were less than Nelson's previous full-time salary and "on terms in the ordinary course of [LG's]  
15 business" from August through December 2007. *Id.* at 5 and Aff. at ¶ 6. However, LG's  
16 response does not verify the amount of the monthly payments to Nelson or Nelson's previous  
17 full-time salary. LG Chairman, Tom Loeffler, attests that during this time period, Nelson  
18 provided advisory services directly to him and that he and Nelson may have had over 100  
19 conversations regarding firm matters during that time. LG Response at 5 and 8, and Aff. at ¶ 7.

20 After the severance period ended in December 2007, LG entered into a consulting  
21 arrangement with Nelson for part-time work for which payments began in January 2008 in the  
22 same amount as the severance payments. LG Response at 6 and Aff. at ¶ 10. According to LG,  
23 the firm wanted to continue to consult with Nelson on various firm matters during this time, and

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1 because the work would be similar to the work she performed during the severance period, the  
2 parties agreed to payments in the same amount. *Id.* at 6.

3 Information obtained by the Commission indicates that the McCain campaign was aware  
4 of both LG's 2007 severance package and the 2008 consulting agreement with Nelson, and that  
5 it had no objection to Nelson working with LG on an "occasional basis provided that it did not  
6 interfere with any of her work for the Campaign." It appears that the McCain Committee  
7 operated under the understanding that the payments were commercially reasonable and pursuant  
8 to LG's policies. Available information indicates that the campaign instructed LG that any  
9 salary payments that Nelson received from the firm pursuant to the 2008 consulting agreement  
10 "would have to be the usual and normal rate paid for such work in order to comply with federal  
11 election law and regulations," and the campaign reviewed the consulting agreement between  
12 Nelson and LG to ensure that it addressed these concerns. Neither LG nor Nelson, however,  
13 have provided a copy of this agreement to the Commission, and Nelson also did not file a  
14 response to the complaint, even though she was notified of it.

15 The arrangement between Nelson and LG ended in May 2008 when the McCain  
16 campaign instituted a conflict of interest policy applicable to lobbyists that prohibited campaign  
17 employees from being registered lobbyists. As a result of the McCain Committee's new policy,  
18 Nelson left LG to work exclusively for the campaign, and LG de-listed her as a lobbyist in its  
19 2007 Year End Reports filed pursuant to the Lobbying Disclosure Act of 1995. *See Loeffler*  
20 *Group's 2007 Year End Lobbying Reports, dated Feb. 14, 2008, available at*  
21 [http://www.senate.gov/legislative/Public\\_Disclosure/LDA\\_reports.htm](http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm).

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**B. Legal Analysis**

The Act prohibits contributions to a candidate or authorized committee in excess of \$2,300 in connection with federal elections. 2 U.S.C. § 441a. The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A). LG is a limited liability partnership, and, as such, its contributions are permissible, subject to a \$2,300 contribution limit. 11 C.F.R. § 110.1 (b)(1) and (e). A contribution by a partnership is attributed to the partnership and to each partner "[i]n direct proportion to his or her share of the partnership profits" or according to the partners' profit-sharing agreement as long as "[o]nly the profits of the partners to whom the contribution is attributed are reduced (or losses increased)" and "[t]hese partners' profits are reduced (or losses increased) in proportion to the contribution attributed to each of them." *Id.* There are five partners listed on the firm's website, and four donated the maximum \$2,300 to McCain's primary election campaign.<sup>2</sup>

In the context of employment-related compensation, Commission regulations provide that payments from a third party to a candidate shall be considered a contribution unless the "compensation results from *bona fide* employment that is genuinely independent of the candidacy," "is exclusively in consideration of services provided by the employee as part of this employment," and "the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same time period." See 11 C.F.R. § 113.1(g)(6)(iii). While this regulation applies to payments made to a candidate, the provision nevertheless aids in the analysis of the payments made to Susan Nelson as it sets

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<sup>2</sup> Commission records indicate that LG partners Michael P. Daniels, Robert H. Finney, Tom Loeffler, and Hans C. Rickhoff each contributed \$2,300 to the McCain Committee for the primary election.

1 forth standards by which to analyze compensation by third parties to highly-placed campaign  
2 employees to determine whether the compensation results in a contribution to the campaign.

3 The Commission has, in past enforcement matters, determined that compensation did not  
4 result in a contribution where the information available was consistent with the respondents'  
5 contentions that the arrangements were for *bona fide* services performed, independent of the  
6 candidacy, and did not exceed the compensation paid to similarly qualified persons. At the  
7 reason to believe stage, the Commission has examined the complaint and responses, alongside  
8 any publicly available information, in making this determination. For example, in MUR 5260  
9 (Talent for Senate), the Commission found no reason to believe that violations occurred as result  
10 of payments from a law firm and university to a candidate, where the information provided by  
11 Respondents indicated that the payments were for *bona fide* employment, the candidate's high  
12 public profile played a role in determining the amount of his compensation, there was no  
13 indication to suggest that the compensation was for anything other than *bona fide* services, and  
14 the evidence showed that compensation paid to Talent was comparable to compensation paid to  
15 similarly qualified persons for the same work over the same period of time. MUR 5260, First  
16 General Counsel's Report, dated December 19, 2002, at 16-23. In that matter, the Commission  
17 noted that there was "an absence of any evidence tending to show that Arent Fox and Talent  
18 entered into their arrangement with the intent to subsidize Talent's Senate campaign or  
19 exploratory efforts." *Id.* at 23.

20 Other matters have required investigations into the criteria set forth in 11 C.F.R. § 113.1.  
21 In MUR 5014 (Jeff Flake for Congress), the Commission investigated whether payments made to  
22 a federal candidate by a non-profit organization were prohibited or excessive contributions under  
23 the Act. At the reason to believe stage, the available information raised questions about the

2904424492

1 amount of work the candidate performed, whether the amount of compensation paid to the  
2 candidate was commensurate with his work and whether it was comparable with what would be  
3 paid to another similarly qualified person, why the timing of the consulting agreement was to last  
4 only for the duration of the campaign, and whether the organization would have had sufficient  
5 funds to pay the candidate without a substantial donation made by the candidate's campaign co-  
6 finance chairman at that time the candidate was hired. After the investigation, the Commission  
7 determined there was insufficient evidence in that matter to support the alleged violations.  
8 Instead, the evidence suggested that there was a *bona fide* consulting agreement between the  
9 parties, the salary payments were made to the candidate only for services he rendered, and the  
10 amount of the candidate's compensation was commensurate with the amount paid to similarly  
11 qualified persons performing the same work. MUR 5014, General Counsel's Report # 2, dated  
12 October 3, 2003, at 5-18.

13 Similarly, in MUR 5571 (Tanonaka for Congress), the Commission authorized an  
14 investigation when information available at the reason to believe stage suggested that the  
15 candidate's receipt of a lump sum payment from Koa Companies was contrary to the terms of the  
16 consulting agreement and was paid at a time when his campaign committee's financial position  
17 was poor; the candidate concealed his business relationship with Koa until after state and federal  
18 agencies initiated investigations into his campaign activities; and the candidate engaged in a  
19 pattern of hiding the sources of funds used to make his personal loans to his campaign,  
20 suggesting knowing and willful violations of the Act. See Factual and Legal Analysis for Dalton  
21 Tanonaka and Tanonaka for Congress. However, the Commission found, after an investigation,  
22 that there was a consulting agreement between Tanonaka and the Koa Companies for *bona fide*  
23 consulting services, the agreement was independent of Tanonaka's candidacy, and that

2904424493

1 compensation Tanonaka received was in consideration for services he performed for the  
2 company and commensurate with the amount of money that would be paid to any similarly  
3 qualified person for the same work over the same period of time. See MUR 5571, General  
4 Counsel's Report # 2, dated September 20, 2007; *c.f.*, MUR 5638 (Bill Abbott For Preserving  
5 American Jobs) (found reason to believe and entered into conciliation agreement with union  
6 where Respondents admitted that payments to the candidate were not for *bona fide* employment,  
7 genuinely independent of the candidacy, in consideration for services provided, or equivalent to  
8 what would be paid to similarly situated employees).

9 The complaint questions whether LG's payments to Nelson were for *bona fide*  
10 employment or were intended solely to supplement her smaller salary with the McCain  
11 campaign. If the latter is true, then LG would have made excessive in-kind contributions to the  
12 McCain Committee. 2 U.S.C. § 441a. The complaint also raises a legitimate concern over  
13 whether Nelson could have simultaneously worked as the Finance Director for a presidential  
14 campaign and provided consulting services to another employer. However, the response from  
15 LG and other available information rebut these allegations, and the Commission has found no  
16 information in the public record to contradict assertions that Nelson did perform work for LG  
17 during the time period in question. LG's response verifies that the payments to Nelson were for  
18 work she performed for the firm. In a sworn affidavit, LG Chairman Tom Loeffler explains that  
19 payments made to Nelson from August through December 2007 were part of a severance  
20 package, and from January through April 2008, the payments were compensation for her *bona*  
21 *fide* consulting services. LG, however, does not provide any examples of projects on which  
22 Nelson consulted during this time. The available information also indicates that the McCain  
23 Committee reviewed LG's consulting agreement with Nelson, and it relied on "express

2904424494



statements" made by LG that both the severance and consulting agreements with Nelson were "consistent with and pursuant to [LG's] pre-existing severance policy and practices . . . in the usual and ordinary course of LG's business and at commercially reasonable terms." Thus, there is no information to suggest that LG's payments to Nelson were not for actual services she performed for the firm.

The complaint also draws attention to the size of the monthly payments LG made to Nelson (\$15,000) compared with Nelson's monthly salary with the McCain campaign (\$6,300). This fact alone does not suggest that LG's payments were not for *bona fide* consulting services or in an amount greater than what would be paid to a similarly qualified individual for the same type of work. In fact, it is not unusual for compensation in the private sector to be substantially greater than payments made to campaign staff members. In the context of advisory opinion requests, the Commission has permitted compensation plans that are tied to factors other than billable hours, such as seniority, the ability to attract clients, and other skills. For instance, in Advisory Opinion 2004-08 (American Sugar Cane League), the Commission found there was no prohibited contribution where a corporation's severance package to a candidate was tied to past employment services, based on objective considerations, and comparable to those packages offered to similarly qualified employees. *See also* Advisory Opinion 2006-13 (Spivack) (compensation paid to candidate did not constitute a contribution as long as it was in accordance with the firm's established compensation plan); Advisory Opinion 2004-17 (Klein) (compensation for consulting services actually rendered was not a contribution if it satisfied criteria in 11 C.F.R. § 113.1(g)); Advisory Opinion 1979-74 (Emerson) (compensation for services that is comparable to amount paid to other similarly qualified persons for the same work over the same period would not be a contribution). However, the Commission has been clear

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1 over the years that where compensation is tied to billable hours, a contribution results when the  
2 candidate's compensation is not reduced to reflect the actual hours worked. *See, e.g.*, Advisory  
3 Opinion 2000-1 (Taveras); Advisory Opinion 1980-115 (O'Donnell); Advisory Opinion 1978-06  
4 (Garr).

5 While LG does not describe the salaries that other similarly qualified persons would have  
6 received for the same work, 11 C.F.R. § 113.1(g)(6)(iii)(C), in his affidavit, Tom Loeffler does  
7 explain how he determined Nelson's salary payments for this time period. He explains that  
8 Nelson's compensation was not tied to billable hours, but rather "on the basis of [Loeffler's] 30  
9 years experience as an employer with knowledge of the marketplace and the true value of a  
10 person's professional services," and included factors such as seniority and status within the firm,  
11 Nelson's ability to attract and retain clients, her skills, and her "value to [LG] as an around-the-  
12 clock advisor." LG Response at 3 and Aff. at ¶ 3. LG also states that its severance agreement  
13 was made in accordance with the firm's past practices, in the firm's "ordinary course of business  
14 on terms substantially similar to those offered other employees in recognition of bona fide  
15 work," and did not exceed an amount given to others in similar situations. *Id.* at 12 and Aff. at  
16 ¶ 6.

17 Although LG indicates that Nelson's monthly payments during this time period were less  
18 than her monthly salary when she worked full time for the firm, LG does not specify the amount  
19 of those monthly payments or Nelson's previous salary. Further, although the Lobbying  
20 Disclosure Act of 1995 requires lobbying firms to register their lobbyists and report the firm's  
21 income and expenditures, the firm is not required to report individual lobbyists' salaries.  
22 According to news reports, however, lobbyists' salaries for well-connected staff can start as high  
23 as \$300,000 a year. *See* Jeffrey H. Birnbaum, *The Road to Riches is Called K Street*, WASH.

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1 POST, June 22, 2005, at A01. Previously, Nelson had been a Principal at the firm, and had many  
2 years of professional fundraising and government affairs consulting experience at the firm and  
3 previously with other organizations. LG Response at 3 and Aff. at ¶ 1. As further justification  
4 for her salary payments, Loeffler also explains that he relied heavily on Nelson during the time  
5 period in question because three other "key personnel" had recently left the firm. *Id.* at 5.

6 There is no information available to demonstrate that LG's payments to Nelson from  
7 August 2007 through April 2008 were inappropriate. LG contends that the payments were tied  
8 to Nelson's consulting services actually rendered to the firm, that it had a past business practice  
9 of offering severance packages to departing employees, that it followed such practice in offering  
10 Nelson a severance package, that Nelson's payments were tied to factors other than billable  
11 hours, and that they were less than her prior full-time salary. 11 C.F.R. § 113.1(g)(6)(iii). The  
12 complaint fails to provide any specific information that would contradict these assertions.

13 Even though LG's response appears to rebut the speculative allegations in the complaint,  
14 some questions remain regarding how much work Nelson actually performed for the firm.  
15 Although LG's response makes general statements that Nelson's compensation did not exceed  
16 the amount that would have been given to others in a similar situation, the response fails to  
17 provide any specific examples in support. In similar cases, the Commission has weighed the  
18 information in the complaint and responses when determining whether to proceed with an  
19 investigation. In MUR 5736 (Friends for Mike McGavick), for instance, the Commission found  
20 that while the responses to the complaint were not factually complete, the complaint, which  
21 alleged that the candidate's employer altered the terms of his employment agreement that in turn  
22 resulted in lucrative benefits for the candidate, failed to provide sufficient facts to warrant an  
23 investigation. See MUR 5736, First General Counsel's Report dated Nov. 22, 2006. In that

2904424497

1 matter, the Respondents explained that the candidate's employment agreement was converted to  
2 a severance package in the ordinary course of business and included payments for services  
3 McGavick was to provide during the company's transition to a new CEO. *Id.* at 3-5. Moreover,  
4 there was no information available to indicate that McGavick did not perform *bona fide* work for  
5 the corporation during the transition or that he was paid more than other departing executives.  
6 *Id.* at 10; *see also*, MUR 5701(Bob Filner for Congress), First General Counsel's Report, dated  
7 July 10, 2006, at 5 (finding allegations and available information did not warrant an investigation  
8 where the respondent provided "sufficient and specific facts to rebut the complainant's  
9 allegations" that a business run by the candidate's spouse was a "sham"). In the *Filner* matter,  
10 there was also no information presented to contradict the Respondents' contentions that *bona*  
11 *fide* services were provided to the campaign committee and that the company was paid fair  
12 market value for the work. *Id.*

13 Similarly, while the response from LG in this matter does not provide substantial details  
14 regarding the arrangements with Nelson, the allegations in the complaint lack sufficient facts to  
15 contradict the representations made in LG's response. *See* Statement of Reasons of  
16 Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas in  
17 MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee), issued  
18 December 21, 2000 (stating that "a complaint may be dismissed if it consists of factual  
19 allegations that are refuted with sufficiently compelling evidence provided in the response to the  
20 complaint"). Accordingly, the Commission finds no reason to believe that The Loeffler Group,  
21 LLP violated 2 U.S.C. § 441a or that Susan Nelson violated the Act.

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